U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 7 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center (director) on October 12, 2008. Subsequently, the director served the petitioner with a notice of intent to revoke the approval of the petition (NOIR) on April 4, 2012. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker on July 2, 2012. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is an IT consulting business. It seeks to employ the beneficiary permanently in the United States as a computer programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director revoked the approval of the petition on July 2, 2012, stating that the petitioner had failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

At the outset, the AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out the number of petitions the petitioner had filed and that the record did not establish the petitioner's ability to pay the proffered wage to each of its sponsored beneficiaries, that would warrant a denial if unexplained and

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

unrebutted, and thus was properly issued for good and sufficient cause. The NOIR specifically noted that the petitioner had paid the beneficiary less than the proffered wage in the years in question and that the petitioner's net income and net assets were not sufficient to pay the balance of the wages owed to the beneficiary and the proffered wages of all other sponsored beneficiaries.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on April 22, 2008. The proffered wage as stated on the ETA Form 9089 is $87,006 per year. The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2004 and to currently employ 21 workers. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the ETA Form 9089, signed by the beneficiary on August 1, 2008, the beneficiary states that he has worked for the petitioner since January 7, 2008.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner

to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards. However, the petitioner has submitted Internal Revenue Service (IRS) Forms W-2 for the beneficiary showing that it has paid the beneficiary a portion of the proffered wage in the following years:

Year	Wages Paid
2008	$58,656.00
2009	$52,732.80
2010	$63,992.00
2011	$83,213.60
2012	$82,162.40

As the petitioner did not pay the beneficiary the full proffered wage for any year in question, the petitioner must establish its ability to pay the beneficiary the balance between the proffered wage and the wages paid for 2008 to 2011, as follows:

Year	Difference between proffered wage and wages paid
2008	$28,350.00
2009	$34,273.20
2010	$23,014.00
2011	$3,792.40
2012	$4,843.60

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and

profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2008 to 2011, as shown in the table below.

- In 2008, the Form 1120 stated net income of $12,632.
- In 2009, the Form 1120 stated net income of $13,051.
- In 2010, the Form 1120 stated net income of $3,258.
- In 2011, the Form 1120 stated net income of $13,116.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2008 to 2011, as shown in the table below.

- In 2008, the Form 1120 stated net current assets of $97,812.
- In 2009, the Form 1120 stated net current assets of $107,445.
- In 2010, the Form 1120 stated net current assets of $106,412.
- In 2011, the Form 1120 stated net current assets of $109,732.

After reviewing the file, the AAO sent a request for evidence (RFE) to the petitioner, with a copy to counsel of record, advising the petitioner that according to USCIS records the petitioner had filed multiple petitions on behalf of other beneficiaries. The AAO asked the petitioner to provide evidence of the petitioner's continuing ability to pay each of its sponsored beneficiaries the proffered wage. The AAO specifically requested the following information for each beneficiary for whom the petitioner has filed a Form I-40 petition since the April 22, 2008 priority date of the instant case:

- Full name of the beneficiary
- Receipt number and priority date of each petition
- Exact dates employed by the petitioner
- Whether the petitions are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition
- The wage paid to each beneficiary from the priority date of the instant petition (April 22, 2008) to present
- Form W-2 or 1099 issued to each beneficiary from the priority date of the instant petition (April 22, 2008) to present

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[2]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner's response included a letter dated June 7, 2013 from [redacted] of the petitioner, stating that the instant beneficiary is the only I-140 beneficiary currently being sponsored by the petitioner. The letter also states that according to it records, the petitioner had sponsored the following individuals for Form I-140 petitions, but that the petitioner had requested that each petition be withdrawn.[3] The petitioner also submitted the following Forms W-2 for the other sponsored beneficiaries.

[redacted]	Employment Status	Forms W-2 submitted
	Resigned September 16, 2010	2008, 2009, 2010
	Resigned March 1, 2012	2011
	Resigned May 17, 2012	2010, 2011
	Resigned December 1, 2007[4]	2008

However, the petitioner's response did not include the priority dates or the proffered wages listed on the filed petitions. This information is required to calculate the petitioner's total wage burden for all beneficiaries from the priority date on the instant petition onwards. Without this information, the AAO cannot make a positive determination regarding the petitioner's ability to pay using its net income or net current assets.[5]

On appeal, counsel asserts that the petitioner is not required to show its ability to pay the proffered wage to all beneficiaries, but rather only this individual petition is at issue. However, counsel is incorrect. The petitioner must establish that the job offer is realistic and in doing so must establish that it has the ability to pay any given beneficiary the proffered wage from the priority date onward.

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[3] The evidence submitted establishes that the petitioner did request to withdraw the Form I-140 petition for [redacted] However, the other withdrawal requests and confirmations submitted by the petitioner for the above named beneficiaries were for Form I-129 petitions.

[4] The petitioner submitted Form W-2 for [redacted] for 2008. The Form W-2 from 2008 reflects that the petitioner paid [redacted] $21, 120 in that year. It is unclear why the petitioner would have been paying [redacted] in 2008 when she resigned in December 2007. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988),

[5] We note that in the NOR, the director calculated the wages owed to the sponsored beneficiaries as follows:

Year	Wage burden (Total proffered wages less wages paid)
2008	$96,266.00
2009	$149,417.00
2010	$205,975.00

On appeal, the petitioner did not object to this calculation or question its accuracy. Nor did the petitioner submit alternative evidence to demonstrate that it had the ability to pay the wages owed to all beneficiaries for the years in question.

The petitioner must show that it has sufficient funds available to pay each beneficiary while covering all other established wage obligations created by the filing of the Form I-140 petitions.

Counsel alternatively asserts that USCIS cannot use information from other petitions to adjudicate the instant petition without giving the petitioner notice. Counsel cites 8 C.F.R. § 103.2(b)(16)(i) which requires that USCIS give the petitioner notice if it will make an adverse decision based on derogatory information *of which the petitioner is unaware* (emphasis added). In the instant case, the AAO provided such notice in its May 2013 RFE. Further, as the petitioner has filed the Form I-140 petitions, it is aware of this information contained in those petitions.

Counsel further asserts that the petitioner does not have to submit the requested information because it did not pertain to the instant petition. The AAO disagrees. The information requested is required to establish whether or not the petitioner is eligible to sponsor the beneficiary for the classification requested, namely to establish its ability to pay the beneficiary the proffered wage, and as such it is pertinent to the instant case. As noted above, the information submitted by the petitioner was not responsive to the request from the AAO. As such, the AAO is precluded from making a positive determination on the petitioner's ability to pay. Therefore, we find that the petitioner has not demonstrated its ability to pay the beneficiary the proffered wage from the priority date onward.

Furthermore, the petitioner was notified in the RFE that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denial. *See* 8 C.F.R. 103.2(b)(14) failure to submit the requested information precludes a material line of inquiry and forms an independent basis for denial.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL. Thus it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Also beyond the decision of the director, the record does not establish that a *bona fide* job offer exists. The proffered position job location is listed as California on both the Form I-140 petition and ETA 9089. On the ETA 9089, the beneficiary states that he has been working for the petitioner at a worksite located in California from January 7, 2008 to the present. However, the Form I-140 petition lists the beneficiary's home address as NY and the Forms W-2 submitted confirm that the beneficiary has lived in New York from 2008 to 2009 and in New Jersey from 2009 to present. It is unclear how the beneficiary has been working at an office in California while living over 2800 miles away. It is noted that the approved labor certification does not mention the possibility of working at client sites or at various unanticipated locations, nor does it mention travel or remote work. It is noted that on appeal, counsel asserts that the job description contained in H.11 is sufficient to establish that the DOL and U.S. workers were notified that the job would include work at unanticipated client sites. The AAO is not persuaded by counsel's statement. The language used in crafting the job description, which

states "he is also required to coordinate all technical jobs both on-site and off shore," is not indicative of placement at end-user client sites, travel to unanticipated locations or remote work.

Additionally, as mentioned by the director in the NOR, in 2010 a USCIS officer visited the petitioner's reported address at [redacted] California and found no workers or management present. On appeal, counsel states that the investigation was conducted two years prior to the revocation of the petition's approval and therefore should not be considered. Counsel also asserts that the petitioner was not given sufficient notice of the investigation. However, counsel has not submitted an explanation for the lack of workers at the business location or provided evidence to demonstrate that the petitioner's business does operate and employ workers at the reported address. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, we find that the petitioner has not established that a realistic and *bona fide* job offer exists, as it was described on the approved labor certification application.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.